Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 40.

HENRY KELLOGG, Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

J. M. CARLISLE,
J. D. McPHERSON,
For Appellant.

JUDD & DETWEILER, Printers, 517 Seventh Street.

IN THE

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HENRY KELLOGG, APPELLANT,
vs.
THE UNITED STATES.
No. 40.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims. The appellant filed his petition in that court; the United States demurred; the demurrer was sustained, and the petition dismissed.

THE CASE.

This was a case in which the petitioner, under the provisions of an act of Congress, surrendered certain rights and transferred certain property to the United States, under a promise of compensation therefor, but has never received any compensation therefor.

The essential facts set forth in the petition and exhibits, are as follows:

Degges and Smith, brick-makers, in January, 1854, undertook and became bound to furnish to the United States, and the United States covenanted to receive from them not less than twenty-five nor more than forty million bricks for the Washington aqueduct; these were to be delivered along the line of the aqueduct, and in quantities as required by the superintendent of the work. The better to ensure their performance of the contract

they were bound by its terms to prepare yards capable of turning out sixty thousand bricks per day.

A. H. Mechlin and Columbus Alexander became sureties for the performance of the contract.

More than a year elapsed before any bricks were required, and when, in the spring of 1855, the superintendent of the work notified Degges & Smith that four million bricks would be wanted during the coming summer, they made no response, and their sureties, Mechlin and Alexander, to save themselves from loss, undertook to perform the contract. To this end they purchased land suitable in character and location for a brickyard, and commenced preparing it and providing machinery, but, without completing it, they made an agreement with Wm. H. DeGroot to make and deliver the bricks, and they gave him authority to receive the price. They at the same time turned over to him the brickyard and machinery prepared by them, taking, however, a deed authorizing them to resume possession thereof in case DeGroot should fail to perform the contract.

DeGroot did fail, and Mechlin and Alexander resumed possession of the yard and appurtenances, and made an agreement with the appellant in this case, H. Kellogg, substantially to the same effect as that with DeGroot, and gave him possession of the yard and its appurtenances. This was in March, 1856. Kellogg went on to complete the yard, to add machinery to manufacture the brick required, and to make preparations to furnish the larger quantities expected to be called for. He also furnished all the bricks required that season. At the session of 1855-56, Congress made no appropriation whatever for continuing the work, but, on the contrary, made a small appropriation to pay off liabilities and preserve the work done. This was understood by the United States officers and all parties to be an indefinite suspension of the work, and Kellogg discharging his workmen, placed the yards in such condition of security as he could, and endeavored, without success, to sell his brick elsewhere.

In the following March, however, [1857,] another change of policy took place. Congress appropriated a large sum for con-

tinuing the work, and at the same time passed a joint resolution, (No. 18,) in the following words:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury shall settle and adjust with all the parties respectively interested therein, on principles of justice and equity, all damages, losses, and liabilities incurred or sustained by said parties, respectively, on account of their contract for manufacturing brick for the Washington aqueduct; and he is hereby directed to pay the amount found due by such settlement and adjustment, out of the appropriation made for paying the liabilities for the said aqueduct, by the act 'making appropriations for certain civil expenses of the Government for the year ending June thirtieth, eighteen hundred and fifty-seven,' approved the eighteenth of August, eighteen hundred and fifty-six: *Provided*, That the said parties first surrender to the United States all the brick made, together with all the machinery and appliances, and other personal property prepared for executing the said contract, and that the said contract be cancelled.

"Approved March 3, 1857."

This was in effect, and was understood to be a proposition made to the parties "interested" in the contract, which they were at liberty to accept or reject, and, as it was, was a condition precedent to any action under it, that "all the brick made, together with the machinery and appliances, and other personal property prepared for executing the said contract," should first be surrendered to the United States, it was in fact and in form a proposition to buy the contract itself and all the means of performing it; and the purchase must necessarily be made of those parties who possessed the things intended to be purchased. Mechlin and Alexander held the contract subject to Kellogg's rights under them, and Kellogg alone held "all the bricks, machinery, appliances, and other personal property." Without his concurrence, and the surrender by him of his property, owned and actually possessed by him, the act could not have, and was not intended to have any operation.

The Government, therefore, by its proper officer, called upon Kellogg, as well as Mechlin and Alexander, to elect whether they would accept the provisions of the act, or would go on to

perform the contract, and they decided to accept the proposition thus made.

Another party also came in, DeGroot, who had first been employed by Mechlin and Alexander, had put up some machinery, made some bricks, and incurred some losses. He also retained some reversionary interest in the brick-yard, and some of the machinery, and he claimed to be also entitled to indemnification under the act. So to make the transfer of the property to the Government perfect, and leave no ground for cavil, Mechlin and Alexander, DeGroot and Kellogg, all united in a deed, releasing the contract, and conveying to the United States the bricks made, machinery, wood, coal, horses, carts, and every appliance necessary for the manufacture of bricks, all of which were delivered up to the proper officers of the Government, together with the brick-yard itself, and the bricks therein.

THE CONTRACTORS' CLAIMS.

The next step was to receive payment for the property thus sold, and delivered according to the agreement under which it was delivered.

Still, with the view of disembarrassing the United States of any questions between the several parties interested, all the said parties united in presenting their claims; that is, they joined in a single paper containing the whole, but they, each for himself, presented a separate schedule of his "losses, damages, and liabilities," and claimed, separately and distinctly, each for himself, the respective amounts thereof as payable to himself. (Rec., pp. 4, 28.)

They claimed first, their respective actual outlays, less the amounts received; and, second, the profits which they would have realized had they gone on to perform the contract.

The Secretary of the Treasury, after some months spent in consideration of the matter, determined—

1. That under the act he would pay simply and only the actual value of the property delivered to the United States under the act, taking "its value when abandoned by the contractors."

2. That he would make payment of all the amount payable under the act, to Mechlin and Alexander, and not any part to Kellogg. (Rec., p. 31.)

Kellogg, in indignant terms, protested in writing against this decision, but of course without effect. (Rec., p. 35.)

Out of the amount thus received by Mechlin and Alexander, they paid to Kellogg the sum of $10,476.96 in discharge of certain obligations incurred in the course of their dealings.

Upon these facts the Court of Claims ruled that Kellogg had no further claim against the United States, because he had submitted his demands to the award of the Secretary of the Treasury, and the Secretary had made an award within the submission, or, if not within the submission, still the petitioner by receiving money from Mechlin and Alexander, was concluded to dispute it.

These rulings, as set forth at large in the certificate of the court, will be examined in detail.

FIRST RULING.

"*That the United States by the joint resolution of March* 3, 1857, *set forth in the petition in this case, and the claimant by certain instruments of writing, also set forth in the said petition, submitted themselves to the award of the Secretary of Treasury as to the matter of the claim in the said petition stated.*" (Rec., p. 37.)

In this the court erred. There was no claim in existence when the resolution passed. The claim arose under that resolution. It was founded upon the surrender of the property to the United States, and the cancelling of the contract, all which was authorized by and done under the resolution alone, and could not have been done without it. The resolution is not a proposition for the settlement of matters in dispute between the parties. There was nothing to arbitrate when the act passed. The direction to the Secretary was to settle "*with* all the parties." An arbitrator does not settle with the parties. Under this act the Secretary was simply the agent of one of the parties to settle *with* the others.

SECOND RULING.

"*That the Secretary made an award upon said claim.*" (Rec., p. 37.)

This is error. The Secretary refused to recognize this petitioner as having any rights under the resolution. He decided that all the money that could be paid under the resolution must be paid to Mechlin and Alexander; that they alone came within the description of the persons to claim under the resolution, and that the petitioner did not come within it. (Rec., p. 35, par. 32, 33.) The Secretary denied the petitioner's right to make any claim under the resolution, and *thus* could not make an award upon his claim.

THIRD RULING.

"*That the award was within the submission.*" (Rec., p. 37.)

The demand presented by the petitioner was for money laid out to the amount of $54,186.12 over and above receipts in preparing a brick-yard, materials, buildings, and machinery, and making and delivering bricks. (Rec., p. 29, fol. 31.) What he was entitled to under the resolution was the amount of his "damages, losses, and liabilities." If there was any submission, both parties submitted the question of the "damages, losses, and liabilities incurred or sustained by said parties respectively, on account of their contract for manufacturing brick, &c." (Rec., p. 3.) The Secretary awarded payment "for such loss as they have sustained in consequence of the failure of the Government to make the necessary appropriation for completing the contract." (Rec., p. 33, par. 15.) The two propositions are entirely different.

The act proceeds on the case of an existing executory contract in force at the date of the passage of the resolution; it purchases from the petitioner the contract itself and all he has on hand prepared to execute it; and repays him all he has lost in executing it so far.

The other makes the case of a refusal of the Government to proceed under the contract—"the failure of the Government to make the necessary appropriation for *completing* the contract," and undertakes to compute and award the loss in consequence of that failure.

These two cases have not an element in common. The petitioner might have incurred heavy losses "on account of the contract," and yet he might have sustained no loss whatever "by

the failure of the Government to make the necessary appropriation."

On the other hand he might have sustained no loss whatever on account of the contract. His machinery, yards, &c., might have been worth every dollar they cost, and more, and he might yet have sustained great damage from the refusal of the Government to "complete the contract," *i. e.*, to take and pay for the brick he was prepared to make.

But even under his own construction of the resolution, the Secretary mistook the law of the case. If the contractors were entitled to recover "the loss sustained in consequence of the failure of the Government to make the necessary appropriation for completing the contract," the measure of that loss was what they would have received had the contract been completed, less the cost of completing it, and nothing more or less; in other words, the profit they would have made by going on. Under his construction of the resolution, the Secretary certainly should have paid this; but without conceding that they were entitled to be paid profits, he says he is "relieved from the necessity of having a judgment on this point by another view of the case," (Rec., p. 34, par. 27,) which is this; [and here is another blunder in applying the law.]

He says if the contractors had gone on to deliver the bricks, the price accruing to them would have amounted to $218,750, and the cost of delivering them $113,018.71, leaving a difference in their favor of $105,731.29; but inasmuch as they had already expended $119,375 83, *there would have been no profits*—that the total cost of making the bricks would have been $232,394 54, and the price only $218,750, so *on the whole* there must have been no profit. That is to say, the contractors having gone more than half way in their work, and being now at a point where they can receive $200,000 by expending $100,000, and *thus make a clear profit of* $100,000 *on what they have yet to do*, are to be turned off with nothing, because, forsooth, they *had already expended* more than that $100,000 on what they have already done. If a mechanic undertakes to build for $10,000 a house which will cost him $11,000, he may be turned off at any stage of the

work without any compensation whatever, because the job will not on the whole yield a profit; he may be within a day's work of completing it—he may have only five dollars more to expend to be entitled to his whole $10,000, and, according to the Secretary's law, the work may be stopped just there, and the builder told that the job *on the whole* would yield no profit, and he can have no pay whatever.

This doctrine needs no further argument. In fact, in our view of the case, the question never need have arisen.

FOURTH RULING.

"*That the Secretary of the Treasury, by his award, gave to Alexander and Mechlin, and Columbus Alexander, a fund as trustees for themselves, and whoever else might be entitled to share in it.*" (Rec., p. 38; p. 4.)

This is error. The Secretary said this: that Mechlin and Alexander were "the only contractors known to the Government, and as the contract under which the claim has arisen especially provided against sub-contracting, I am of opinion that Mechlin and Alexander are *entitled* to draw the money, and all rights and equities as between them and other parties must be referred to the courts of the country." They received the money, because they were entitled to it, of course subject to all rights and equities in others, just as every man takes and holds every species of property. The Secretary's decision gave this petitioner no rights against Mechlin and Alexander. No trust was created by the award. The Secretary meant to say, and did say, in substance, that if this petitioner had any claims against any one, it was not against the United States, but against Mechlin and Alexander; and that is all he did say.

FIFTH RULING.

"*That the claimant, by receiving from Mechlin and Alexander a sum of money as stated in the petition, ratified the award, and is now concluded to dispute its validity.* (Rec., p. 38, p. 5.)

This is error. If the petitioner received *the money of the Government*, he is of course concluded, but the receipt from them of any sum *of their own money*, for any purpose, it is

submitted could have no possible effect upon the relations of the claimant with the Government. If Mechlin and Alexander saw that they had in fact profited by the petitioner's loss, that they had received any sum of money which they were not justly entitled to, and what was really a part of what the petitioners ought to have had, and they, under such circumstances, then choose to pay over to him a part of it, how is that any ratification of the award by which Mechlin and Alexander got the money? It was their money. They were not accountable to the Government for it. They did not get it in consequence of any act of the petitioner; nor was the Government prevented from getting it back in consequence of any act of the petitioner. If he had not taken it Mechlin and Alexander would have kept it. That they chose, out of their own funds, to make a gratuity to petitioner, or even to pay him a portion of the amount justly due him from the Government of the United States, cannot, it seems to us, possibly enure to the benefit of the Government, beyond a credit for the amount paid. Nor can the petitioner's acceptance of this gratuity or voluntary payment, out of the funds of Mechlin and Alexander, have the effect to ratify any transaction between them and the Government.

But it is averred in the petition that the payment made by Mechlin and Alexander, though made out of the fund so received by them, was not made in pursuance of the award, but upon other considerations. For example, it appears in the proceedings that the petitioner had delivered bricks to the United States, and received ninety per cent. on the price; the retained ten per cent. amounted to $2,118.40, and was his money, but the Secretary made this an item of his award to Mechlin and Alexander. (Rec., p. 34, par. 23.) If Mechlin and Alexander chose to pay over this sum to the petitioner, can it be said that he could not receive it without affirming the whole award of the Secretary, and thus admit what the Secretary said—that he never was entitled to that sum or any other sum whatever from the United States?

POINTS.

I. *There was no submission by either party to an arbitration.*

There was no matter of difference to arbitrate when the resolution passed, and that resolution constitutes the only alleged or supposed submission on the part of the United States. That resolution directed the Secretary to *settle with the petitioner* the amount to be paid, and to pay it; not to arbitrate any disputed demands.

II. *If there was such submission, the Secretary has made no award on the claim of the petitioner.*

He has simply declared that the petitioner was not a party to the submission. He decided expressly that no one but Mechlin and Alexander could be paid anything under that act. He expressly excluded from consideration the rights of any party who claimed simply as one who had sustained losses on account of the contract, and this decision excluded the petitioner who claimed in no other right.

III. *Mechlin and Alexander were not constituted trustees, nor intended so to be, by the Secretary, nor had he any authority to appoint them trustees.*

His duty was to pay to the persons entitled. He had no right, and never intended, to place the fund in the hands of Mechlin and Alexander for distribution, or to render them accountable for it to the United States or to individuals. Nothing in the whole case evinces any such intent.

IV. The payment by Mechlin and Alexander to the petitioner has no relation to the payment by the United States to them.

CONCLUSION.

We submit that the judgment of the Court of Claims should be reversed, and the case remanded for further proceedings.

J. M. CARLISLE,
J. D. MCPHERSON,
For Appellant.

SUPREME COURT OF THE UNITED STA

No. 155.

DECEMBER TERM, A. D. 1867.

HENRY KELLOGG, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

No. 155.

DECEMBER TERM, A. D. 1867.

HENRY KELLOGG, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

I.

This case comes into this court by appeal from the judgment of the Court of claims. The case was heard in that court upon the petition and demurrer filed thereto, by the United States. The demurrer was sustained, and the petition dismissed; and from the judgment of said court, dismissing said petition, this appeal is prosecuted.

II.

Averments of the petition.

The material facts appearing from the appellants petition and exhibits, (which are made a part of the petition.) are as follows:

1st. That by an act approved March 3, 1853, (10 Stat. at Large, p. 206,) Congress authorized the commencement of an acqueduct to supply the city of Washington with water, upon such plan as the President of the United States shculd approve; that a plan was approved, and Captain Montgomery C. Meigs, of the corps of engineers, was appointed to superintend the execution of the work.

2d. That on the 23d day of January, 1854, Captain Meigs, on behalf of the United States, and with the approval of the Secretary of War, entered into a contract with William H. Degges and Francis H. Smith, by which they, said Degges & Smith, agreed to furnish for said work not less than *twenty-five* nor more than *forty millions* of bricks, for

which the United States agreed to make payment, at the rate of eight dollars and seventy-five cents per thousand. To secure the faithful performance of this contract, Degges & Smith gave bond in the penal sum of *thirty thousand* dollars, with Alexander H. Mechlin and Columbus Alexander as sureties.

3d. The contract entered into between Captain Meigs, on behalf of the government, and Degges & Smith, contained the following provisions, viz:

"*A.* And this contract is also expressly understood to be subject to the terms and conditions of the joint resolution of Congress, approved April fourteenth, one thousand eight hundred and fifty-two, containing a proviso in the following terms, to wit: *Provided*, nothing herein contained shall be so construed as to authorize any officer of the United States to bind the United States by contract beyond the amount appropriated by Congress, or to sanction any such contract heretofore made.

"*B. Provided, also*, That it is expressly understood and agreed that this contract, nor any part thereof, shall not be sub-let nor assigned."

4th. That on the 12th day of March, 1855, Congress having appropriated $250,000 for continuing the work on the Washington aqueduct, Captain Meigs gave notice to Degges & Smith, and also to their sureties, Mechlin & Alexander, that there would be required for the work contemplated on the aqueduct of that season *four million* of bricks, to be delivered at such points along the work as might from time to time be designated. To this notice Degges & Smith made no response, but utterly abandoned their undertaking, and failed to comply with their contract.

5th. That Degges & Smith, having made default in the performance of their contract, Mechlin & Alexander, in order to save themselves from loss and prosecution on their bond, entered into an arrangement with Captain Meigs, by which they assumed the contract which had been made with Degges & Smith, upon the same terms and conditions as made with Degges & Smith.

6th. That Mechlin & Alexander purchased land adjacent to the line of the intended work, containing clay suitable for making bricks, and proceeded to make extensive preparations for the manufacture of the number of bricks necessary to fulfil their contract; but before completing their arrangements *they* did, on the 9th day of May, 1855, enter into an agreement with William H. De Groot, whereby they transferred all the property which had been acquired by them, for the purpose of performing said contract to said De Groot, who undertook and agreed to furnish the brick which Mechlin & Alexander had contracted to furnish. De Groot was to pay to Mechlin & Alexander five per cent. of the amount which the government was to pay for the manufacture and delivery of the said bricks. Mechlin & Alexander executed a power-of-attorney to De Groot, by which he was authorized to receive from the government the money which would become due to Mechlin & Alexander under their contract.

7th. De Groot failed to comply with his agreement with Mechlin & Alexander, and *they* thereupon, afterwards, to wit, on the 3d day of March, 1856, entered into a contract with the claimant, by which he undertook to furnish all the bricks required, and to be required of Mechlin & Alexander for the construction of the aqueduct, and to receive payment therefor from the United States at the contract price, and to pay over to Mechlin & Alexander five per cent. of the amount so received; and Mechlin & Alexander by deed constituted the claimant *their lawful attorney to furnish the bricks, and to receive payment therefor.*

8th. The claimant continued to furnish bricks as the agent of Mechlin & Alexander, and under his contract with them, during the summer of 1856, until what remained of the appropriations for the building of the aqueduct was exhausted, when the claimant was notified by Captain Meigs not to make or deliver any more bricks.

9th. That on the third of March Congress passed a joint resolution which, in substance, contained a proposition to the parties interested in said brick contract to the effect that if they would consent to cancel the contract, and would turn over to the United States the bricks made and the machinery and other appliances for making bricks, the United States would settle with the parties interested in said contract, "on the principles of justice and equity, all damages, losses, and liabilities incurred or sustained by said parties respectively on account of their contract." The resolution is in the following words:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury shall settle and adjust with all the parties respectively interested therein, on principles of justice and equity, all damages, losses, and liabilities incurred or sustained by said parties respectively, on account of their contract for manufacturing brick for the Washington aqueduct; and he is hereby directed to pay the amount found due by said such settlement and adjustment out of the appropriation made for paying the liabilities for the said aqueduct by the act 'making appropriations for certain civil expenses of government for the year ending June thirtieth, eighteen hundred and fifty-seven,' approved the eighteenth of August, eighteen hundred and fifty-six: *Provided,* That the said parties first surrender to the United States all the brick made, together with all the machinery and appliances and other personal property prepared for executing the said contract, and that the said contract be cancelled.

"Approved March 3, 1857."

10th. After the passage of said joint resolution Captain Meigs, superintendent of the work aforesaid, called upon Mechlin & Alexander, as well as the claimant, to elect whether they would proceed to fill the contract or accept the proposition contained in the joint resolution. They elected to accept the proposition of the resolution and cancel the contract, and thereupon executed a deed of surrender, and transferred to the United States all the brick made, together with all the machinery and appliances and other personal property prepared for executing said contract.

11th. Upon the execution and delivery of said deed of surrender and the transfer of the property aforesaid, the Secretary of the Treasury proceeded to make the settlement contemplated by said joint resolution, and awarded to Mechlin & Alexander, as the only persons included in the provisions of the said joint resolution, the sum of twenty-nine thousand five hundred and thirty-four dollars and nineteen

cents, ($29,534 19,) and that of the sum so awarded by the Secretary of the Treasury to Mechlin & Alexander the claimant received the sum of ten thousand four hundred and seventy-six dollars and ninety-six cents, ($10,476 96,) as the amount he was entitled to receive under his contract with said Mechlin & Alexander.

12th. The claimant insists that the award of said sum of money to Mechlin & Alexander, and the exclusion of him from the benefits of said joint resolution by the Secretary of the Treasury, was erroneous, and contrary to the plain intent and purpose of said joint resolution; and that the Secretary of the Treasury should have awarded him, as the amount he was entitled to receive under said resolution, as "a party interested in said contract," the sum of sixty-two thousand six hundred and ninety-two dollars and forty-two cents, ($62,692 42,) to recover which sum, and the interest thereon, amounting in all to ninety-one thousand three hundred and eighty-nine dollars and eighty-seven cents, ($91,389 87,) the suit was instituted.

III.

There was no error in the decision of the Court of Claims sustaining the demurrer to the appellant's petition.

The United States, in the Court of Claims, contended that the demurrer to said petition was well taken, for the following reasons:

1st. It is not shown in said petition that the claimant was ever known or recognized by the United States as one of the parties to or interested in the contract made by Captain M. C. Meigs, on behalf of the United States, for furnishing bricks for the construction of the Washington aqueduct.

2d. That said petition shows that the claimant was acting under a contract with Mechlin & Alexander, (who were the sureties for the fulfilment of the contract of Degges & Smith,) and not under a contract with the United States.

3d. That the petition shows that said claimant was only the agent and attorney of Mechlin & Alexander for the purpose of fulfiling their contract (as sureties of Degges & Smith) for furnishing bricks for the Washington aqueduct, and that he was recognized by the United States as acting only in that capacity.

4th. That under the joint resolution of Congress, approved March 3, 1857, by which the Secretary of the Treasury was authorized to settle with all the parties respectively interested in the contract for manufacturing bricks for the Washington aqueduct, the claimant was not included, because he was not a party to said contract, either originally or by substitution.

5th. That the award made by the Secretary of the Treasury under said joint resolution was final and conclusive, not only upon Mechlin & Alexander, but upon the claimant, as their agent and attorney.

6th. That the award made by the Secretary of the Treasury under said joint resolution, and the payment of the money under said award to Mechlin & Alexander, was in strict accordance with the provisions of said resolution, because Mechlin & Alexander were the only per-

sons known or recognized by the United States as interested in said contract.

7th. The petition shows that after the award of the Secretary of the Treasury to Mechlin & Alexander had been made, and after the payment of the money so awarded to them, the claimant settled with Mechlin & Alexander on account of the work he had performed under said contract, and received from them of said award the sum of ten thousand four hundred and seventy-six dollars and ninety-six cents, ($10,476 96;) and that he thereupon surrendered and transferred to the United States all the property required to be transferred and surrendered to the United States by said joint resolution. The acceptance of the money under said award, and the transfer of his interest in the property which was the subject of said award, was a ratification of the action of the Secretary of the Treasury in awarding and paying said money to Mechlin & Alexander. The claimant is estopped, therefore, from calling in question the correctness and finality of the award so made by the Secretary of the Treasury.

IV.

The appellant was not included nor embraced in the provisions of the joint resolution of Congress approved March 3, 1857, nor entitled to any of the benefits which might result from the passage of said resolution. The decision of the Secretary of the Treasury, excluding the claimant from the benefit of the provisions of said joint resolution, was, therefore, correct, and in strict accordance with the intent and meaning thereof.

The contract from which this controversy results was originally made with Degges & Smith, and Mechlin & Alexander became their sureties for the faithful performance of the contract by Degges & Smith. The contract contained a stipulation that it should not be assigned or sub-let. Mechlin & Alexander elected to proceed with the fulfilment of the contract rather than to be subjected to a suit on their bond. This they were bound to do in virtue of their bond. The government might, therefore, deal with and recognize them as the parties who were bound to the fulfilment of this contract after the default of Degges & Smith. They became parties to the contract by virtue of being sureties for its performance by Degges & Smith. The government dealt with them as having succeeded to all the rights of Degges & Smith, under said contract, and they were also so regarded by Degges & Smith. There was nothing more than this necessary to create a contract between them and the government. There was that mutuality of agreement between all the parties which is the very essence of a contract of that character, and without which it does not exist. (Addison on Contracts, p. 100.)

There was never at any time a contract existing, or recognized by the United States, by which either William H. De Groot or Henry Kellogg became bound to fulfil the contract into which Degges & Smith entered for the manufacture of brick for the Washington aqueduct. The contract of the claimant was only with Mechlin &

Alexander. The government never recognized him as a contractor. It never claimed to have any recourse against him for the *non-performance* of the contract. After the default of Degges & Smith, the government looked to Mechlin & Alexander, as the only parties from whom it might by legal process compel a performance of the contract which had been made with Degges & Smith. The government only recognized the claimant as the agent and attorney of Mechlin & Alexander. It was never claimed that his relations to the government were any other than that. He could receive none of the moneys which became due under said contract, except as the agent and attorney of Mechlin & Alexander; and he was required to produce a properly authenticated power-of-attorney, as evidence of such agency, in order to enable him to transact any business whatever relative to said brick contract. The agreement between the claimant and Mechlin & Alexander expressly provides that they are to remain primarily liable to the United States. The language of the learned judge who delivered the opinion of the majority of this court in the case of William H. De Groot illustrates, with peculiar force, the situation of this claimant so far as the United States is concerned. He says:

" Suppose the United States, instead of agreeing, as she did, to treat with these parties on the most liberal and magnanimous terms, had sued for damages for their many defaults and omissions to fulfil the contract; against whom would such a suit have been entered? Would the claimant have been called upon to respond in damages? Upon what ground could such a suit have been predicated? Not upon any contract the claimant had with the United States, for none existed between them, and there never had been any in respect to this brick contract. If he was not bound, why should the other party be? If there was no *mutual obligation* there was no contract; and if no contract, it is then very clear there was no just or legal claim to any damages, for there could be no violation of that which did not exist. Contracts imply mutuality of rights and obligations, and such a thing as a contract which binds one party, and holds him liable to the utmost damages, and allows the other party to violate its provisions with impunity, without incurring any liability, would be an anomaly in the law.

The position of this claimant in all his relations to the United States, under this contract, could hardly be more clearly or forcibly stated. There is no liability to the United States resting upon him. He is liable only to Mechlin & Alexander. They alone may maintain a suit against him if he fails to comply with his contract by neglecting to furnish the bricks which Mechlin & Alexander were under obligations to furnish as sureties of Degges & Smith. These suggestions lead us directly to the consideration of the question involved in the construction to be given to the joint resolution of Congress, approved March 4, 1857, under which the award of the then Secretary of the Treasury was made.

It has been conclusively shown that the claimant was never a party to the contract referred to in said joint resolution, and it will require no very elaborate argument to show that the claimant never had such an "*interest*" in the contract as to bring him within the provisions of, or entitle him to any benefits which it was contemplated would result from its passage. A brief examination of the several papers annexed to and made part of the claimant's petition will strengthen this con-

clusion. The original contract between Degges & Smith and the United States contained a provision "that said contract nor any part thereof should not be sub-let nor assigned." The agreement between Mechlin and Alexander and the claimant, after reciting that a contract had previously been made between them and William H. De Groot in respect to the manufacture of bricks for the Washington aqueduct, and that De Groot had made default in the performance thereof, provided substantially as follows, to wit:

1st. That said Henry Kellogg, the claimant, should furnish and deliver bricks for the Washington aqueduct in strict compliance with all the provisions, requirements and conditions of the contract for said bricks, entered into and agreed on between William H. Degges and Francis H. Smith, and Captain M. C. Meigs in behalf of the United States, on the 23d day of January, 1854.

2d. That for furnishing and delivering said bricks said Kellogg should receive the sum of eight dollars and seventy-five cents per thousand.

3d. That said Mechlin and Alexander would revoke the power-of-attorney which they had previously executed to William H. De Groot, "and would execute another such instrument in favor of said Kellogg, *to be exercised by him so long and no longer as he shall truly* in all respects, and every particular, promptly, efficiently, and faithfully carry out and fulfil each and every stipulation, condition, and requirement of said agreement."

4th. That Mechlin and Alexander would relinquish and transfer to said Kellogg all their right, title, and interest in and to the lands which they had acquired for the purpose of enabling them to fulfil the said contract as sureties of Degges & Smith.

5th. That in case said Kellogg should fail to carry out fully and in every particular all the provisions and stipulations of said agreement, then said power-of-attorney may be revoked by said Mechlin and Alexander, and they may re-enter and take full and complete possession of all the property which they transferred to said Kellogg.

6th. That the said Kellogg is to pay to said Mechlin and Alexander five per cent. of all the moneys received by him under said agreement.

7th. That the said Mechlin and Alexander are to give and execute said power-of-attorney to said Kellogg, "empowering him as attorney for said parties of the first part, (Mechlin and Alexander,) to receive all moneys from the United States due on account of said brick contract, and to act generally in relation to all business of such contract as the agent and attorney of said parties of the first part," Mechlin and Alexander.

The power-of-attorney executed in pursuance of said agreement constituted the said Henry Kellogg the true and lawful attorney of said Mechlin and Alexander, and empowered him "in their names and stead to receive from the proper officers of the United States all sums of money due, or which might thereafter become due, and owing to them under said contract for bricks furnished said aqueduct, and generally in their names and stead to transact all business in relation to said contract."

These are the only papers which afford any evidence of the nature and extent of the claimant's interest in said contract, and it is submitted that they utterly fail to show that the claimant had acquired any such interest in said contract as to bring him within the provisions of said joint resolution. The allegation in claimant's petition is "that he was the equitable owner of said contract." He could not become this, because the original contract of which he claimed to be the "equitable owner" contained an express stipulation that the same should not be assigned. In order, therefore, to support this pretension of the claimant's equitable ownership or interest in said contract, we must submit to its violation in a material particular. It is the object of equity to enforce snd *sustain* rather than *annul* and violate contracts. Assignments which involve the violation of contracts are not favored in equity, and it would be but an idle expedient to attempt to enforce an equitable assignment in violation of an express contract against such assignment.

It has been shown that the claim of an equitable interest in this contract cannot be supported. There is no pretence of any other interest. The only relation in which this claimant ever stood to this contract was that of agent and attorney of Mechlin and Alexander. He was to act for them in that capacity "so long" as he was faithful to his obligations, and fulfilled his contract with them in every particular and "no longer." The agreement and power-of-attorney, all speak of him as the agent and attorney of Mechlin and Alexander; they nowhere speak of him as "interested in the contract." If he had such an interest in the contract, neither the petition nor the exhibits in support of it show it. The petition failing to show this material fact must be held fatally defective. The averment of interest is the material and essential allegation, and without knowing this we may not determine whether the Secretary of the Treasury acted in accordance with the intent and purpose of said joint resolution or not.

V.

The appellant having voluntarily submitted his claims to the determination of the Secretary of the Treasury, was concluded by the action of that officer in regard to them.

The petition avers "that after the passage of said joint resolution Captain M. C. Meigs, superintendent of the works as aforesaid, called upon your petitioner, and upon Mechlin & Alexander, to elect whether they would proceed to fulfil the contract, or would accept the proposition contained in said joint resolution," and that they elected to avail themselves of the provisions of said joint resolution.

That resolution, as will be seen by reference to it, provided that the Secretary of the Treasury should become sole arbitrator between the United States and the parties interested in said contract, as to all matters growing out of, or relating to, the contract for the manufacture of bricks for the Washington aqueduct. The claimant, with others claiming to have an interest in said contract, deliberately

assented to this arrangement, and by their own act constituted the Secretary of the Treasury sole arbitrator between them and the United States, because, without such assent on their part, said joint resolution conferred no power upon the Secretary of the Treasury. The Secretary of the Treasury then, in virtue of the provisions of said joint resolution and the assent of the parties at whose instance and for whose benefit it was passed, was authorized "to settle and adjust with all the parties respectively interested therein, on principles of justice and equity, all damages, losses and liabilities incurred or sustained by said parties on account of their contract for manufacturing bricks for the Washington aqueduct." The Secretary of the Treasury, under the authority which he derived from said joint resolution and the assent of said parties, was vested with full power and authority—

1st. To ascertain the parties interested in the contract mentioned in said joint resolution and entitled to the benefits thereof. He alone could determine this, for the resolution names none of the parties.

2d. To determine the amount of "damages, losses, and liabilities" incurred or sustained by such parties as he found to be interested therein, on account of their contract for manufacturing bricks for the Washington aqueduct.

3d. To pay the amount found to be due upon such settlement and adjustment out of a certain appropriation specified in said joint resolution.

These several facts, the petition avers, were determined by the Secretary of the Treasury, and the amount which he found due under said joint resolution paid to the parties who, under the decision of the Secretary of the Treasury, were entitled to receive it.

The petition seeks to have the award of the Secretary of the Treasury under said joint resolution disregarded, and a re-examination of his claim by this court, upon the ground that the arbitrator "mistook the intent and meaning of said joint resolution" when he excluded the claimant from any participation in the award made by the Secretary of the Treasury under said joint resolution. The petition charges upon the arbitrator neither fraud, misbehavior, or excess of power, as a ground for reviewing and setting aside the award. In Morgan *vs.* Mather, 2 Ves., 15, Lord Loughborough lays it down as clear that corruption, misbehavior, or excess of power are the only grounds for setting aside awards.

The question submitted to the arbitrator by said joint resolution, as to what parties were interested in said contract, was a question of law, not less than one of fact. This question of law the arbitrator could alone decide, and if his decision were erroneous, the claimant, as well as the United States, was bound by it, for the joint resolution provided no other tribunal in which the questions submitted to the Secretary of the Treasury might be re-examined.

Judge Story, in Kleine *vs.* Catara, 2 Gallison, 61, said: "Under a general submission, the arbitrators have rightfully a power to decide on the law and the fact, and an error in either respect ought not to be

the subject of complaint by either party, for it is their own choice to be concluded by the judgment of the arbitrators."

Indeed, it is now well settled that when arbitrators have acted within the jurisdiction conferred upon them by the submission, and have fully determined the matters submitted to them, then their decision can only be reviewed for fraud or misconduct. A mere mistake, either of law or fact, will not authorize a court to interfere with or set aside an award.

Watson on Arbitrations, p. 289.
Story's Equity, vol. 2., sec. 14, 54.
Mitchell *vs.* Rush, 7 Cowen, 185.
Jackson *vs.* Ambler, 14 Johns., 105.
Merritt *vs.* Merritt, 11 Ills.. 568.
Pottle *vs.* McWhorter, 13 Ills., 456.

In conclusion it is submitted that the demurrer to the petition was properly sustained by the Court of Claims, for the following reasons :

1st. Because it is nowhere shown in said petition that the claimant had any legal or equitable interest in the contract which was submitted to the Secretary of the Treasury for settlement and adjustment.

2d. Because the appellant, having voluntarily joined in the submission of the matters in controversy to the Secretary of the Treasury, became thereby a party to such submisssion.

3d. Because the appellant having accepted a portion of the fruits of such submission, has ratified the award of the Secretary of the Treasury and is therefore *estopped* from calling in question the correctness of the award made by the Secretary of the Treasury. unless it is shown that the Secretary of the Treasury was guilty of fraud or misconduct in making such award.

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